75-1325

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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1975

No. 75-1311

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION and M-C INTERNATIONAL, INC.,
Petitioners,

vs.

SUNKIST GROWERS, INC. and RELIANCE COMMERCIAL ENTERPRISES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
For the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutory provisions involved	3
Statement of the case	3
Reason for granting the writ	5
This court now should resolve the conflict of decisions among the circuits as to the availability of the remedy of dissolution to private litigants	5
Conclusion	14

Table of Authorities Cited

Cases	Pages
American Continental Barge Line Co. v. Eastern Gas & Fuel Associates, 204 F. Supp. 451 (S.D. Ohio 1962)	7
American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958), aff'g 152 F.Supp. 387, 400 (S.D.N.Y. 1957)	7
Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 384 (1967)	5, 6
Continental Securities Co. v. Michigan Cent. R. Co., 16 F.2d 378 (6th Cir. 1926); cert. denied, 274 U.S. 741 (1927)	7
Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D.Tex. 1971), aff'd, 476 F.2d 989 (5th Cir. 1973)	7

	Pages
Fuchs Sugars & Syrups, Inc. v Amstar Corp., 1975-2 Trade Cases ¶60,568 (S.D.N.Y. 1975)	7
Graves v. Cambria Steel Co., 298 Fed. 761 (S.D.N.Y. 1924)	7
Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970)	11
International Boxing Club of New York v. United States, 358 U.S. 242 (1959)	11, 12
International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 518 F.2d 913 (9th Cir. 1975)	6, 7, 8, 9, 11
Julius M. Ames Co. v. Bostitch, Inc., 240 F.Supp. 521 (S.D. N.Y. 1965)	7
NBO Industries Treadway Companies, Inc. v. Brunswick Corporation, 523 F.2d 262 (3d Cir. 1975), cert. granted 44 U.S.L.W. 3471 (U.S. February 23, 1976) (No. 75-904) sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.	8
Pacific Coast Agricultural Export Association et al. v. Sunkist Growers, Inc. et al., 526 F.2d 1196 (9th Cir. 1975)	9
Schine Chain Theatres v. United States, 334 U.S. 110 (1948)	13
Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1 (9th Cir. 1960), rev'd, 370 U.S. 19 (1962)	5
United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945)	11
United States v. California Fruit Growers Exchange, et al., 1940-1943 Trade Cas. ¶56,247 (S.D. Cal. 1942)	5
United States v. United States Gypsum Co., 340 U.S. 76 (1950)	12
Venner v. Pennsylvania Steel Co., 250 Fed. 292 (D.N.J. 1918)	7
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	11
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	10

Statutes

	Pages
Clayton Act:	
Section 4 (15 U.S.C. §15)	3
Section 7	8
Section 16 (15 U.S.C. §26, 38 Stat. 731)	3, 9
Sherman Act:	
Section 1 (15 U.S.C. §1, 26 Stat, 209 as amended)	2, 3, 6
Section 2 (15 U.S.C. §2, 26 Stat. 209 as amended)	2, 3, 6
Section 4 (15 U.S.C. §4)	9
15 U.S.C. §16	2, 6
28 U.S.C. §1254(1)	2

Texts

Adams, The Aluminum Case: Legal Victory-Economic Defeat, 41 Am. Econ. Rev. 915 (1951)	11
Comment, Vertical Integration in Aluminum: A Bar to Effective Competition, 60 Yale L.J. 294 (1951)	11
Erickson, Economics of Price Fixing, 2 Antitrust L. & Econ. Rev. 83, 119 (Spring 1969)	10
Parker, The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy, 3 N. Mex. L.Rev. 286 (1973)	10

IN THE

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OCTOBER TERM, 1975

No.

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION
and M-C INTERNATIONAL, INC.,
Petitioners,

vs.

SUNKIST GROWERS, INC. and RELIANCE
COMMERCIAL ENTERPRISES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
For the Ninth Circuit

Petitioners Pacific Coast Agricultural Export Association and M-C International, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 11, 1975.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at 526 F.2d 1196 and is attached hereto as Appendix A. Its orders denying rehearing were filed on December 17, 1975, and January 29, 1976 and are attached hereto as Appendices B and C respectively.

The opinion of the United States District Court for the Northern District of California is attached hereto as Appendix D.

JURISDICTION

The judgment of the district court, after trial by jury, was entered on May 15, 1973. The judgment of the court of appeals affirming the judgment of the district court was entered on November 11, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the remedy of dissolution available to a plaintiff in a private antitrust action under 15 U.S.C. §26 where

(a) the defendant whose dissolution is sought is an habitual violator of the antitrust laws and

(b) the jury has found that such defendant violated §1 of the Sherman Act by a conspiracy to restrain trade, and violated §2 of the Sherman Act by monopolizing, attempting to monopolize, and conspiring to monopolize?

STATUTORY PROVISIONS INVOLVED

Section 16 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §26, provides in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

Section 1 of the Sherman Act, 26 Stat. 209 as amended, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Act, 26 Stat. 209 as amended, 15 U.S.C. §2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

STATEMENT OF THE CASE

The district court had jurisdiction of this antitrust action pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26).

The case is correctly stated in the opinion of the court of appeals:

"Plaintiff-appellant Pacific Coast Agricultural Export Association (the Association) is a Webb-Pomeraine association[1] of fresh fruit exporters who among other things serve as middlemen in exporting oranges to Hong Kong and the Far East. Plaintiff-appellant M-C International, Inc. (M-C) also exports oranges to Hong Kong.

"Defendant and cross-appellant Sunkist Growers, Inc. (Sunkist) is a federated agricultural cooperative comprised of several thousand Arizona and California citrus fruit growers who grow and pack citrus fruits for sale in the United States and abroad. Defendant and cross-appellant Reliance Commercial Enterprises, Inc. (Reliance) conducts business as a broker of citrus fruits in the Far East.

"As assignee of the rights of seven of its members, the Association charged Sunkist with violating Section 1 of the Sherman Act [15 U.S.C. §1], by conspiring with Reliance to restrain trade, and with violating Section 2 [15 U.S.C. §2], by conspiring and attempting to monopolize and monopolizing exports from Arizona and California to Hong Kong. In a separate action M-C similarly charged both Sunkist and Reliance. The actions were consolidated for trial by agreement. [footnote omitted]

"The jury returned a general verdict and answered 16 special interrogatories in favor of plaintiffs, finding that Sunkist and Reliance had engaged in each alleged anticompetitive practice.

"[1]The Webb-Pomeraine Act [15 U.S.C. §§61-65], allows exporters to form associations for the sole purpose of marketing goods abroad. Such associations enjoy an exemption from antitrust liability for that export trade."

The jury fixed damages at $238,704 for the Association's assignors, and $2,363 for M-C. [footnote omitted]

"The district court thereafter awarded treble damages and attorneys' fees of $205,250. [footnote omitted] It ordered the termination of defendants' exclusive sales agreement, and enjoined Sunkist from refusing to sell oranges through its domestic and export departments to qualified buyers at competitive prices. The court refused to enjoin Sunkist from selling to Hong Kong importers, either directly or through nonexclusive agents, and also denied plaintiffs' request that Sunkist be dissolved." (Appendix A at 2-3)

REASON FOR GRANTING THE WRIT

THIS COURT NOW SHOULD RESOLVE THE CONFLICT OF DECISIONS AMONG THE CIRCUITS AS TO THE AVAILABILITY OF THE REMEDY OF DISSOLUTION TO PRIVATE LITIGANTS

This case involves a situation in which Sunkist, an habitual violator of the antitrust laws,[1] was found by

[1]In terms of the antitrust laws, Sunkist is a recidivist:

(1) A 1942 consent decree which binds Sunkist specifically prohibited the commission of many of the acts which the jury in the present case found that Sunkist was still committing. *United States v. California Fruit Growers Exchange, et al.*, 1940-1943 Trade Cas. ¶56,247 (S.D. Cal. 1942), attached as Appendix E hereto.

(2) In *Case-Swayne Co. v. Sunkist Growers Inc.*, 389 U.S. 384 (1967), this Court held that Sunkist had been in violation of the antitrust laws for over seventy years.

(3) In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 9, 34 (9th Cir. 1960), *rev'd*, 370 U.S. 19, 29-30 (1962), the court of appeals affirmed a jury determination that

the jury to have violated Section 1 of the Sherman Act, to have monopolized and attempted to monopolize in violation of Section 2 of the Sherman Act, and to have conspired with its codefendant to monopolize in violation of Section 2 of the Sherman Act. Nevertheless, plaintiff's request for dissolution was denied by the Court of Appeals for the Ninth Circuit on the basis of its ruling that dissolution is not a remedy available to private litigants.

After quoting from the district court opinion which expressed uncertainty as to the availability of such relief, the court of appeals indicated:

> "This court has subsequently ruled that the dissolution remedy is not available to private antitrust litigants. *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d at 922." (Appendix A at 24)

The instant case represents the most recent expression of the difference of opinion among the circuits as to whether dissolution is or is not available to a private litigants.[2] It reiterates the view of the Ninth

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Sunkist had violated Sections 1 and 2 of the Sherman Act. This court reversed only as to Section 1.

(4) In *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 458 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967), the court of appeals reversed the district court's grant of a directed verdict for defendants, holding that ". . . there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section 2 of the Sherman Act."

[2]Except for the instant case, the relevant decisions refer to "divestiture" rather than "dissolution". However, there is no distinction between divestiture and dissolution for purposes of determining remedies available under 15 U.S.C. §16. *International T. & T. Corp. v. General T. & E. Corp., supra,* 518 F.2d at 922-23 and n.49. In that case, the Ninth Circuit held that while the terms dissolution and divestiture may not be technically interchangeable, "[i]f the terms do have a distinct meaning for antitrust purposes, then 'dissolution' is the inclusive term and divestiture is a subcategory".

Circuit and other authorities (consisting mostly of pre-1930 decisions) that dissolution is not available to private litigants. *Continental Securities Co. v. Michigan Cent. R. Co.*, 16 F.2d 378, 379-80 (6th Cir. 1926); *cert. denied*, 274 U.S. 741 (1927); *American Commercial Barge Line Co. v. Eastern Gas & Fuel Associates*, 204 F. Supp. 451, 453 (S.D. Ohio 1962); *Graves v. Cambria Steel Co.*, 298 Fed. 761 (S.D. N.Y. 1924); *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292 (D.N.J. 1918).

Decisional authority in the Second and Fifth Circuits directly conflicts. *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 1975-2 Trade Cases ¶60,568 (S.D. N.Y. 1975); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780, 797-98 (S.D. Tex 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 525 (2d Cir. 1958), *aff'g* 152 F.Supp. 387, 400 (S.D.N.Y. 1957).

This conflict was recognized by the Ninth Circuit in holding that divestiture was not available to private litigants. In *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913 at 924 (9th Cir. 1975), the court of appeals acknowledged its disagreement with the ruling in the *American Crystal Sugar* case, *supra.*

Recently the Third Circuit appears to have joined that line of cases recognizing a private litigant's right to obtain dissolution. *NBO Industries Treadway Companies, Inc. v. Brunswick Corporation,* 523 F.2d 262 (3d Cir. 1975), *cert. granted* 44 U.S.L.W. 3471 (U.S. February 23, 1976) (No. 75-904) *sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* While somewhat equivocal (". . . we need not decide a rule of general application with respect to the availability of divestiture relief under §16"), the Third Circuit decision offered every indication that private litigants were not foreclosed from obtaining dissolution. Although agreeing with the analysis of the legislative history in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., supra,* the Third Circuit questioned the validity of the Ninth Circuit's conclusion that divestiture is not a remedy available to private plaintiffs (*Id.* at 278-79). Noting that dissolution might well be appropriate for Clayton Act §7 violations involving an actual anticompetitive effect, the court determined divestiture to be inappropriate in the case at hand because the §7 violation involved only a potential effect upon competition (*Id.* at 279).

Obviously the question as to the scope of injunctive relief in private antitrust actions—specifically the permissibility of decreeing dissolution—is an important one. It is also a recurrent question, as evidenced by three court of appeals decisions dealing with this issue during the last year. *NBO Industries Treadway Companies, Inc. v. Brunswick Corporation, supra;*

International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., supra; Pacific Coast Agricultural Export Association et al. v. Sunkist Growers, Inc. et al., 526 F.2d 1196 (9th Cir. 1975). At present the answer depends upon the particular circuit in which the question arises. For that reason, only this Court can resolve the issue definitively. It should do so now by recognizing the propriety of ordering dissolution in a private antitrust action. Several factors compel that result.

First, the decisions disallowing dissolution in private actions totally ignore the key fact that divestiture and dissolution are forms of mandatory injunction worked out by courts of equity to give meaning to Section 4 of the Sherman Act and Section 16 of the Clayton Act. Dissolution derives from court-framed injunctions, and it is not a creature of statute for the Department of Justice or the private treble-damage litigant. It is instead a judicially-created affirmative injunction, and no reason appears why the equity powers of the court are more limited in shaping injunctions in private than in public suits.

Further, there are strong public policy reasons for allowing private litigants the remedy of dissolution. Recent critical analysis has noted the treble damage action's failure to reimburse the plaintiff for damages suffered and to punish antitrust violators sufficiently to deter them from future unlawful conduct. Because of the substantial time lag between injury and recovery, the inability of the court to award interest from the date of injury, the effects of inflation, the

uncertainty in measuring damages and the reluctance of many plaintiffs to commence litigation, the treble damage remedy is an insufficient deterrent. *E.g.*, Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy,* 3 N. MEX. L.REV. 286 (1973). In this case, the assignors of P.C.A.E.A. and M-C incurred damages in 1966 for which they commenced action as early as 1968, but it will be close to ten years before the judgment is satisfied.

On the other side of the same coin, profits from illegal combinations probably exceed the penalties. Erickson, *Economics of Price Fixing,* 2 ANTITRUST L. & ECON. REV. 83, 119 (Spring 1969). Moreover, this Court has recognized the difficulty encountered by treble damage plaintiffs in recovering lost profits. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 338-341 (1971).

Thus, while victims may not be overeager to initiate litigation with its attendant uncertainties, violators may find it very profitable indeed to continue unlawful behavior even though they may occasionally be found liable. Sunkist's own antitrust record is incontrovertible evidence that neither the fear of treble damages nor the threat of government action could curb its abuse of monopoly power. *(Supra* at 5 n.1).

Further, dissolution can restore meaningful competition by the breakup of market structures, an objective which cannot be achieved simply by awarding damages. The Ninth Circuit was forced to "acknowledge" that in denying divestiture "we withhold from private parties the simplest, easiest and surest form

of relief for antitrust violations". *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., supra,* 518 F.2d at 925.

An additional problem confronting courts in dealing with a vertical monopoly such as Sunkist is that pricing by a monopolist in the various stages of manufacture and distribution is not determined by competitive market factors. Thus, even if a court compels a monopolistic supplier to sell on a nondiscriminatory basis, there is no way the court can determine that the price is fair to the parties or that it will result in a desirable allocation of resources. *See Industrial Bldg. Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1342-43 (9th Cir. 1970); *cf. United States v. Aluminum Co. of America,* 148 F.2d 416, 436-38 (2nd Cir. 1945); Comment, *Vertical Integration in Aluminum: A Bar to Effective Competition,* 60 YALE L.J. 294 (1951); Adams, *The Aluminum Case: Legal Victory-Economic Defeat,* 41 AM. ECON. REV. 915 (1951).

In cases such as the instant one, involving a persistent and wilful antitrust violator's pervasive misuse of monopoly power, dissolution may well be the only remedy which can afford plaintiffs sufficient relief. It is the only relief which can serve "the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969).

This Court determined the equitable relief required in such cases in *International Boxing Club of New York v. United States,* 358 U.S. 242 (1959). In that

action, the lower court found that the defendants had combined and conspired in restraint of trade in the field of world championship boxing contests and had conspired to monopolize and monopolized these contests. It entered a post-trial decree which dissolved two of the corporate defendants, directed divestiture of certain stock owned by the individual defendants, and granted various other forms of injunctive relief.

This Court upheld the decree:

> "The yardstick which the trial court should apply in monopolization cases is well stated by the Court in Schine Chain Theatres v. United States, 1948, 334 U.S. 110, 128-129, 68 S.Ct. 947, 957, 92 L.Ed. 1245. The decree should (1) put 'an end to the combination or conspiracy when that is itself the violation'; (2) deprive 'the antitrust defendants of the benefits of their conspiracy'; and (3) *'break up or render impotent the monopoly power which violates the Act.'*" (*Id.* at 253.) (emphasis added).

In the instant case the court of appeals restricted itself to the first objective articulated by the Supreme Court. It did nothing to deprive defendants of the benefits of their conspiracy; it did nothing to break up Sunkist's monopoly power.

In *United States v. United States Gypsum Co.*, 340 U.S. 76, 80 (1950), this Court stated:

> "A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal."

The necessity for dissolution, as opposed to injunctive relief, was stated by Justice Douglas in *Schine Chain Theatres v. United States,* 334 U.S. 110, 128 (1948):

> "In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. *If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors.* Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees." (emphasis added).

According to the foregoing cases, flagrant misuse of monopoly power such as that found by the jury in the present case is properly remedied by dissolution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,
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March 12, 1976.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
Ninth Circuit

Nos. 74-1093, 74-1128, 74-1094, 74-1129 and 74-1130

Pacific Coast Agricultural Export Association,
Plaintiff-Appellant, Cross-Appellee,

vs.

Sunkist Growers, Inc.,
Defendant-Appellee, Cross-Appellant.

M-C International, Inc.,
Plaintiff-Appellant,

vs.

Sunkist Growers, Inc., et al.,
Defendants-Appellees, Cross-Appellants.

Nov. 11, 1975

As Amended On Denial of Rehearing
Dec. 17, 1975
Rehearing Denied Jan. 29, 1976

OPINION

Before: DUNIWAY, ELY and WRIGHT, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

In this private antitrust action several parties appeal and cross-appeal from aspects of a judgment for treble damages, attorneys' fees and injunctive relief. We affirm.

Plaintiff-appellant Pacific Coast Agricultural Export Association (the Association) is a Webb-Pomeraine association[1] of fresh fruit exporters who among other things serve as middlemen in exporting oranges to Hong Kong and the Far East. Plaintiff-appellant M-C International, Inc. (M-C) also exports oranges to Hong Kong.

Defendant and cross-appellant Sunkist Growers, Inc. (Sunkist) is a federated agricultural cooperative comprised of several thousand Arizona and California citrus fruit growers who grow and pack citrus fruits for sale in the United States and abroad. Defendant and cross-appellant Reliance Commercial Enterprises, Inc. (Reliance) conducts business as a broker of citrus fruits in the Far East.

As assignee of the rights of seven of its members, the Association charged Sunkist with violating Section 1 of the Sherman Act [15 U.S.C. § 1], by conspiring with Reliance to restrain trade, and with violating Section 2 [15 U.S.C. § 2], by conspiring and attempting to monopolize and monopolizing exports from Arizona and California to Hong Kong. In a separate action M-C similarly charged both Sunkist and Reliance. The actions were consolidated for trial by agreement.[2]

[1]The Webb-Pomeraine Act [15 U.S.C. §§ 61-65], allows exporters to form associations for the sole purpose of marketing goods abroad. Such associations enjoy an exemption from antitrust liability for that export trade.

[2]A third action, *Lepinay v. Sunkist Growers, Inc.*, No. C-69-332-CBR, was also consolidated and heard with these cases, but the jury verdict that Lepinay was not injured by any acts of Sunkist or Reliance was not appealed.

The jury returned a general verdict and answered 16 special interrogatories in favor of plaintiffs, finding that Sunkist and Reliance had engaged in each alleged anticompetitive practice. The jury fixed damages at $238,704 for the Association's assignors, and $2,363 for M-C.[3]

The district court thereafter awarded treble damages and attorneys' fees of $205,250.[4] It ordered the termination of defendants' exclusive sales agreement, and enjoined Sunkist from refusing to sell oranges through its domestic and export departments to qualified buyers at competitive prices. The court refused to enjoin Sunkist from selling to Hong Kong importers, either directly or through nonexclusive agents, and also denied plaintiffs' request that Sunkist be dissolved.

Sunkist and Reliance object to any form of equitable relief and on cross-appeal urge that the verdicts be set aside for procedural irregularities, errors in the admission of evidence and insufficiency of evidence to support a verdict against either defendant. They also urge that plaintiffs failed to prove actual damage and that the attorneys' fees are excessive.

The Association and M-C argue that the district court's refusal to order dissolution was an abuse of discretion and urge that at the very least the court should have enjoined Sunkist from selling oranges,

[3]Sunkist and Reliance also counterclaimed under the antitrust laws. Plaintiffs prevailed on these counterclaims which are not at issue on appeal.

[4]Of this amount, $5,250 was awarded in connection with defendants' motions for judgment n.o.v. or new trial.

directly or indirectly, to Hong Kong for a period of six years (a period equal to that of the alleged violations).

I.

FACTS

Sunkist citrus growers produce about 75% of the oranges grown in Arizona and California. They process the fruit through 105 packing houses, each of which uses its own brand name as well as the Sunkist trademark. The packing houses are grouped into 20 sales exchanges.[5]

Domestic purchasers may request specific packing house brands, although a federal marketing order[6] limits the number of brand oranges which each packing house can sell in a given time period.

Hong Kong importers purchasing from Sunkist's export department may not specify particular brands, although they may specify a general varietal preference for central valley or southern California oranges. While no federal marketing order limits export sales, Sunkist's export department allocates sales, by means of "pooling" arrangements, largely on a pro rata basis among the several packing houses.

Until 1966, Sunkist's export department relied upon numerous exporting companies, including members of the Association, to generate and maintain

[5]Sunkist's operations have not changed markedly from those described by the Supreme Court in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 386-89, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967).

[6]7 C.F.R. 907, 908 (1975), issued pursuant to the Agricultural Marketing Act [7 U.S.C. § 601 *et seq.* (1970)].

sales to Hong Kong importers. In March of that year, Sunkist terminated these arrangements and began direct sales to Hong Kong through Reliance, its new exclusive agent there. Sunkist performed all export functions, including handling, shipping and insurance. Reliance, through its Hong Kong manager Newman Wu, obtained letters of credit from Hong Kong importers, transmitted orders and price quotations to Sunkist, and generally represented Sunkist's interests in Hong Kong.

In the six months following its agreement with Reliance, Sunkist (which had previously sold direct to Hong Kong only upon occasion) was able to capture nearly 70% of the market for American oranges sold there.[7] The plaintiffs, who had previously been largely supplied by Sunkist's export department, were now able to obtain Sunkist oranges only on the domestic market. Evidence was introduced from which the jury might have inferred that the plaintiffs were at times prevented from purchasing even on the domestic market.

II.

SCOPE OF CAPPER-VOLSTEAD IMMUNITY

As a threshold matter we must determine the extent to which the federal antitrust laws apply to

[7]The percentage sold by plaintiffs and other exporters later increased somewhat, ranging between 38.1% and 55.5% from 1967 to 1971. Although an improving overall market in Hong Kong allowed three of the Association's assignors to attain 1970 volume sales exceeding comparable pre-1966 figures, neither M-C nor any of the assignors has regained its pre-1966 share.

Sunkist's activities. Sunkist claims that it presently[8] qualifies as a grower cooperative under Section 1 of the Capper-Volstead Act [7 U.S.C. § 291], and that therefore its members' joint activities enjoy a broad exemption from the antitrust laws under that act and Section 6 of the Clayton Act [15 U.S.C. § 17]. *See generally Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 210-18 (9th Cir. 1974); Annotation, 20 A.L.R.Fed. 924 (1974).

Sunkist contends that the designation of Reliance as its exclusive agent in Hong Kong was protected conduct under the language of Capper-Volstead Act § 1 providing that:

> [s]uch [cooperative] associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . .

It is well settled, however, that the rights of growers to market cooperatively cannot be deemed to authorize any combination or conspiracy with others which unreasonably restrain interstate or foreign commerce.

[8]In *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), the Supreme Court held that the Capper-Volstead Act does not exempt associations with non-grower packing house members. Sometime in 1968 Sunkist reorganized to bring itself within the Act's exemption, as interpreted by the Court. In *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 355 F.Supp. 408 (C.D.Cal.1971), the court determined that the 1968 reorganization had brought Sunkist within the protection of the Act.

The district court in the case at bar instructed the jury that Sunkist was entitled to the protections of the Capper-Volstead Act. We assume for the purpose of this case that Sunkist qualifies but need not decide the question. *See generally* 20 A.L.R.Fed. 913, *et seq.* (1974).

United States v. Borden Co., 308 U.S. 188, 204-05, 60 S.Ct. 182, 84 L.Ed. 181 (1939). The court instructed the jury that to find a violation of the Sherman Act, Section 1, the jury had to find that "the purpose and effect of such an agreement is unreasonably to exclude the former distributors [plaintiffs] from engaging in the trade in question." To this instruction no party objected. [*See* F.R.Civ.P. Rule 51.]

Nor does the Act immunize cooperatives engaged in competition-stifling practices from actions under the antimonopolization provisions of Sherman Act § 2. *Maryland & Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 463, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., supra*, 497 F.2d at 216. *See also Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association*, 358 F.2d 115 (9th Cir. 1966).

The district court properly instructed the jury as to the scope of Capper-Volstead immunity, and there was no challenge by any party.

III.

SECTION 1 CLAIM[9]

The unchallenged jury instruction on the Section 1 claim fairly embodied the law of this circuit which requires evidence of an agreement the purpose or effect of which is to unreasonably restrain trade. *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-20 (9th Cir. 1972); *Joseph E. Seagram & Sons, Inc. v. Hawai-*

[9]Damage issues under all claims are discussed in Section V, *infra*.

ian Oke Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied* 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). The jury was properly instructed that the formation of an exclusive agency agreement was not illegal *per se*. *Hawaiian Oke* at 76. A good faith, economically motivated decision to switch exporters, as Sunkist has correctly noted, would not subject it to Section 1 liability. *Alpha Distributing Co. v. Jack Daniel Distillery,* 454 F.2d 442, 452 (9th Cir. 1972). Rather, the plaintiffs were required to show that Sunkist's refusal to deal was motivated by a desire to exclude the plaintiffs from the market or to accomplish some other anti-competitive objective. *Bushie,* 460 F.2d at 119-20; *Ricchetti v. Meister Brau, Inc.,* 431 F.2d 1211, 1215 (9th Cir. 1970). Deciding Sunkist's motivation was peculiarly a question for the jury. *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 375, 49 S.Ct. 400, 71 L.Ed. 684 (1927). Its determination is conclusive unless erroneous as a matter of law. *Id.*

The jury's finding that defendants had unlawfully agreed to unreasonably restrain trade is amply supported by the evidence. There were communications from Reliance to Sunkist seeking restrictions on the supply of domestic oranges available to the exporters, followed by Sunkist actions which could be interpreted as attempts to prevent regional exchanges under its control from selling oranges to plaintiffs. Sunkist attempted to secure more shipping space than needed to accommodate its own orders, knowing that plaintiffs might be foreclosed thereby from shipping

many of their orders. Sunkist supplied Reliance with a list of Hong Kong customers acquired by plaintiffs. Early in 1966 Sunkist not only stopped issuing quotations, but also terminated export sales, to domestic exporters.[10]

Although one or more of these actions could be regarded as reasonable responses to competitive pressures, *Trixler Brokerage Co. v. Ralston Purina Co.,* 505 F.2d 1045 (9th Cir. 1974); *Joseph E. Seagram & Sons, supra,* the cumulative evidence was sufficient to permit the jury's finding that they were illegally motivated. *Cf. DeVoto v. Pacific Fidelity Life Insurance Co.,* 516 F.2d 1, 5-6 (9th Cir. 1975). The inference of an implied agreement can, as in this case, be a sufficient basis upon which to predicate liability under Section 1. *Blankenship v. The Hearst Corp.,* 519 F.2d 418, 428 (9th Cir. 1975).

IV.

SECTION 2 CLAIM

The record shows it was well within the province of the jury to find that defendants had monopolized, attempted to monopolize and conspired to do so.

A. *Monopolization.*

The jury was properly instructed that plaintiffs had the burden of proving: (a) that the relevant

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[10]These facts also support the conclusion that unreasonable restraint of trade was effectuated. However, we need not reach this issue since unlawful purpose alone is enough to support a finding of an "actionable conspiracy." *Bushie, supra,* 460 F.2d at 120.

market was the one claimed, *viz.* "oranges grown in Arizona and California for export to Hong Kong;" (b) that Sunkist possessed monopoly power in the relevant market, and (c) that Sunkist committed acts which constituted monopolization of that market. *See United States v. Grinnell Corp.,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Defendants argue that the phrase "oranges grown in Arizona and California for export to Hong Kong" describes a supply, not a distribution, market and that plaintiffs' failure to show illegal monopolization in the supply market frustrates the Section 2 claim.

Surely this argument must fail. In the context of this case it is abundantly clear that the relevant market is that of distribution. In its complaint the Association charged Sunkist with "monopolizing . . . all or most of the *trade and commerce* in citrus fruits with . . . Hong Kong," and with specific efforts to "monopolize such trade and commerce." (Emphasis added.) In its complaint M-C charged monopolization and restraint of trade in "the sale and shipment of citrus fruits from California to Hong Kong."

It would be absurd for plaintiffs to define the relevant market as supply, when throughout the trial it was conceded that Sunkist enjoyed Capper-Volstead protection for production activities. Rather, plaintiffs attempted to show, and did show, that Sunkist's control of supply was employed to extend its monopoly illegally into distribution. *Compare Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith,* 334

U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). *See also The Supreme Court, 1972 Term,* 87 Harv.L.Rev. 57, 277-79 (1973).

Defendants also suggest the export of domestic "brand" and export "pool" oranges constituted separate submarkets after 1966. They argue that plaintiffs were interested only in the domestic "brand" submarket, and that any alleged monopolization of the "pool" submarket did no damage to plaintiffs. There is insufficient evidence in the record to show with any exactitude the degree of cross-elasticity of demand between "brand" and "pool" oranges. The jury was free to view these as substitute goods in Hong Kong, and it appears to have done so.

Sunkist's control of the Hong Kong export market ranged from 45 to 70% during the period 1967 to 1971. Some past decisions have required larger percentages to show monopoly power. *See, e.g., United States v. Aluminum Co. of America,* 148 F.2d 416, 424 (2d Cir. 1945). However, it is now well settled that market share, while being perhaps the most important factor, does not alone determine the presence or absence of monopoly power. In *United States v. Grinnell Corp.,* 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966), the Court stated:

> In *United States v. E. I. du Pont De Nemours & Co.,* 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264, we defined monopoly power as "the power to control prices or exclude competition." The existence of such power ordinarily may be inferred from the predominant share of the market.

Here Sunkist's competitors, although organized into a trade association, were relatively small, with no single competitor controlling over 18% of the market before, or 12% of the market after, Sunkist's entry. Moreover, Sunkist's acknowledged control over the supply market clearly facilitated the acquisition of monopoly power in the distribution market. These facts adequately support the jury's finding that defendants possessed monopoly power in the relevant market.

Several acts of defendants could readily be interpreted by the jury as acts of monopolization. Among these were Sunkist's attempts to restrict the supply of oranges available to plaintiffs, to divert domestic fruit from plaintiff for direct sale to Hong Kong importers, to fraudulently persuade plaintiffs to surrender their customer lists, and to demand shipping advantages for its export operations commensurate with and exceeding its controlling share of the supply market.[11] While Sunkist asserts that its dominance in the Hong Kong export market resulted from its ability, based upon superior efficiency and diligence, to charge lower prices than the middlemen-exporters and from its willingness to accept lower and more reasonable profit margins, it was open for the jury to conclude that more than superior techniques were involved in the rapid rise to market dominance.

[11]The same acts may constitute both an unreasonable restraint of trade and monopolization. *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States,* 362 U.S. 458, 463, 80 S.Ct. 847, 4 L.Ed. 2d 880 (1960).

B. *Attempt to Monopolize.*

The district court instructed the jury that attempted monopolization must be shown by specific intent to monopolize a relevant market, together with a "wrongful" act (or acts) in furtherance of that intent which "create the likely probability" of monopolization. *Compare Swift & Co. v. United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905) (requiring "dangerous probability" of success).

Sunkist argues that language in *Hallmark Industry v. Reynolds Metal Co.,* 489 F.2d 8, 12-13 (9th Cir. 1973), requires a finding of "predatory conduct directed to accomplishing the unlawful purpose" to support an attempted monopolization charge. Even assuming the applicability of *Hallmark* to this case,[12] Sunkist's argument is unavailing. *Hallmark* suggests that the requisite "dangerous probability" of success can be inferred from either specific intent coupled with monopoly power *or* from "proof of specific intent to set prices or exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose." 489 F.2d at 12. Since the jury specifically found, in answer to written interrogatories, both specific intent and monopoly power, the *Hallmark* test is satisfied.[13]

[12]The decision was filed more than one year after the verdict in the instant case.

[13]Although the jury found the existence of "monopoly power" in answer to an interrogatory dealing with the monopolization charge, it is clear that the jury had the same "monopoly power" in mind in connection with the attempted monopolization charge. Likewise, the jury's finding, in connection with the monopolization charge, of a conspiracy constituting an unreasonable restraint of trade was surely kept in mind during deliberation of the attempted monopolization charge.

C. *Conspiracy to Monopolize.*

There was sufficient evidence in the record to permit the properly instructed jury to conclude that Sunkist and Reliance had conspired with the specific intent to monopolize a line of commerce. While an agreement for exclusive distribution of one's own product does not of itself constitute a conspiracy to monopolize, *Bushie v. Stenocord Corp.,* 460 F.2d 116, 120 (9th Cir. 1972), there was also evidence in the record supporting inferences of joint action to preclude exporters from shipping space, joint use of exporters' customer information, and the exclusion or restriction by agreement of exporters from domestic as well as export "pool" oranges.

V.

DAMAGES

Sunkist correctly notes that a private antitrust verdict cannot be sustained without proof of injury. *Gray v. Shell Oil Co.,* 469 F.2d 742, 749 (9th Cir. 1972). The district court so instructed the jury as to each charge, and the requirement was reiterated as to each charge in the written interrogatories.

Sunkist argues *inter alia* that the appellants' damages did not arise proximately from the alleged illegal activity, that the trial judge erroneously allowed a hypothetical question on the damages issue which assumed facts not in evidence, and that market share projections were improper.

A. *Damage Causation.*

Sunkist's contention, like that discussed above in dealing with the "relevant market," is that plaintiffs lost no sales or profits from insufficient supply of export "pool" oranges, since they would not have purchased them even if they were available. We pause here only briefly. As previously stated, the jury could reasonably conclude that there was but one market for Sunkist oranges, be they "pool" or "brand". It could likewise conclude that either the refusal to sell export "pool" oranges, or the restriction of plaintiffs' ability to purchase domestic "brand" oranges, or a combination of both, proximately led to diminution of plaintiffs' market share. Such clearly constitutes "reasonable probability [of] the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue." *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 392 (9th Cir.), *cert. denied* 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). *See also Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.,* 416 F.2d 71, 85-88 (9th Cir. 1969), *cert. denied* 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970).[14]

B. *The Hypothetical Question Allegedly Assuming Facts Not In Evidence.*

Defendants contend that, notwithstanding Sunkist's illegal agreements with Reliance, Sunkist would have

[14]We are mindful of the greater quantum of proof requisite to show the fact of damage as distinguished from the amount thereof. *Flintkote, supra,* 246 F.2d at 392.

competed with plaintiffs in the post-1966 export trade. They therefore object to the district court's allowance of the following hypothetical question propounded by plaintiffs' counsel to each of plaintiffs' witnesses on damages:

> Q. [Plaintiffs' Counsel]: . . . do you have an opinion as to the number of oranges Liberty Gold [or each other exporter] would have sold in Hong Kong had you been able to purchase oranges from Sunkist's export department as you had prior to 1966, *and assuming that Sunkist was—did not sell oranges in Hong Kong for the period subsequent to March 1966?* (Emphasis added.)

This question, defendants argue, induced the finding of an improper amount of damages since much of plaintiffs' diminished market share could have resulted from legitimate competition by Sunkist.

This argument is patently frivolous. Defendants' illegal seizure of a market share to the plaintiffs' injury is not protected merely because the defendant might have achieved the same result by legal means. Moreover, the evidence was conflicting, and the jury may well have concluded that Sunkist would not have taken the risks of entering the export market but for the assurance of an inordinately large return.[15] Such a conclusion complies with the *Flintkote* standard, *supra*.

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[15]Sunkist, of course, could have phrased the same question to plaintiffs' witnesses on cross-examination, but employing the opposite assumption that Sunkist would have entered the market directly even absent its agreement with Reliance.

On numerous occasions the district court instructed the jury, without challenge, of the need to find a causal connection between the unlawful conduct and injury to plaintiffs. In view of this we cannot say that the jury verdict was influenced improperly by the hypothetical question.

C. *Market Share Projections.*

Aside from Sunkist's argument that it would have competed in the post-1966 Hong Kong export market even absent the illegal agreement with Reliance, Sunkist and Reliance also contend that in any event the post-1966 expansion of the Hong Kong market was due solely to their innovations and skill in promoting the sale of American oranges and achieving efficiencies in their distribution to Hong Kong importers. Therefore, they argue, the district court erred in allowing plaintiffs to predicate damage estimates on the theory that plaintiffs would have maintained their pre-1966 market shares in the expanding post-1966 market.

To rebut the defense evidence, plaintiffs offered proof that the market expansion occuring after 1966 came about at least in part because of a general increase in population and income in Hong Kong. Two experts testified that sales of American oranges to Hong Kong would have increased regardless of Sunkist's direct entry into the market.

Plaintiffs' method of measuring damages, known as the "before and after" theory, may be used only where there has been some showing that the market condi-

tions in the two periods were similar but for the impact of the violation. *See Bigelow v. R.K.O. Radio Pictures,* 327 U.S. 251, 259-63, 66 S.Ct. 574, 90 L.Ed. 652 (1946). While this test would not allow a verdict to rest on bare allegations of lost profits and causation, the Supreme Court also ruled in *Bigelow* that:

> . . . [I]n the absence of more precise proof, the jury could [infer] from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes,* that defendants' wrongful acts had caused damage to the plaintiffs.

Id. at 264, 66 S.Ct. at 579. (Emphasis added.)

While plaintiffs' evidence as to the causes of the change in market scope was not overwhelming, it was sufficient to support a "just and reasonable estimate of the damage" by the jury. 327 U.S. at 264, 66 S.Ct. at 580. A defendant whose wrongful conduct has rendered difficult the ascertainment of the amount of damages suffered may not complain that they cannot be measured with exactness and precision. *Eastman Kodak Co. of New York v. Southern Photo Materials Co.,* 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *Hobart Brothers Co. v. Gilliland,* 471 F.2d 894, 903 (5th Cir. 1973).

D. *Other Objections.*

Sunkist and Reliance allege other errors as to damages which deserve brief mention.

The suggestion that the period of damage be limited to the latter half of 1967 is frivolous. There was

evidence of continuous illegal conduct, and resultant injury, from 1966 through 1971. The jury was well within its province to conclude that in fact injury occurred throughout that period.

Plaintiffs' expert witnesses who testified at the trial on damages were properly qualified as experienced businessmen capable of providing information and opinions based on practical experience. *See Hazeltine Research, Inc. v. Zenith Radio Corp.,* 239 F.Supp. 51, 76 (N.D.Ill.1965), *rev'd on other grounds,* 388 F.2d 25 (7th Cir. 1967), *aff'd in part and rev'd in part on other grounds,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed. 2d 129 (1969). To avoid any prejudice, the district court properly cautioned the jury as to the limits of the witnesses' expertise.

VI.

EQUITABLE RELIEF

Sunkist objects to all injunctive relief granted by the district court and the Association in turn requests that Sunkist be dissolved, or in the alternative that broader injunctive relief be granted. Each argument will be discussed below.

A. *Alleged Impropriety of Injunctive Relief Granted.*

1. *Standing.*

Sunkist contends that the Association lacks standing to obtain any form of equitable relief.[16] Further, it

[16]The contention was first made four and a half years after the filing of the complaint. The failure to timely object casts doubt on the argument that the lack of standing constitutes a bar. *See Environmental Defense Fund v. Environmental Protection Agency,* 150 U.S.App.D.C. 348, 465 F.2d 528, 530-531 n.1 (1972).

contends, the *de minimus* damage suffered by M-C ($2,363) does not in equity justify the extensive injunctive relief granted.

Section 4 of the Clayton Act [15 U.S.C. § 15], provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." While an association may not sue on its own to assert the rights of its members under the antitrust laws, it may sue as assignee of the legal rights of others. *Northern California Monument Dealers Ass'n v. Interment Ass'n of California,* 120 F.Supp. 93, 94-95 (S.D. Cal.1954). As assignee, it steps into the shoes of its assignors. *Id.*

Sunkist concedes that the Association's members "assigned their claims to [the] Association for the purposes of this suit." It asserts, however, that the members could not and did not assign their "claims" for injunctive relief. The question of what rights and remedies pass with a given assignment depends upon the intent of the parties. *Northwest Oil & Refining Co. v. Honolulu Oil Corp.,* 195 F.Supp. 281, 286 (D.Mont. 1961).

Since in its complaint the Association recites the assignment of members' "claims," and thereafter prays for both damages and equitable relief,[17] it follows that the parties clearly attempted to assign both legal and

[17]Under Fed.R.Civ.P. 2, all legal and equitable claims are to be joined in one "civil action." *See* 2 J. Moore, Federal Practice ¶ 2.01, at 303-07 (2d ed. 1975). Thus it is logical to assume the word "claim" includes both legal and equitable causes, absent evidence of contrary intent.

equitable claims. We need only determine whether they could do so as a matter of law.

The question turns on whether the Association is the "real party in interest" within the meaning of Fed.R. Civ.P. 17(a). The basic purpose of the rule requiring that every action be prosecuted by the real party in interest is to protect a defendant from subsequent similar actions by one not a party to the initial action. *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.,* 485 F.2d 78, 84 (4th Cir. 1973), *cert. denied* 415 U.S. 935, 94 S.Ct. 1450, 39 L.Ed.2d 493 (1974); *United Federation of Postal Clerks, AFL-CIO v. Watson,* 133 U.S.App.D.C. 176, 409 F.2d 462, 470-71 and n.34, *cert. denied sub nom. Blount v. United Federation of Postal Clerks, AFL-CIO,* 396 U.S. 902, 90 S.Ct. 212, 24 L.Ed.2d 178 (1969); *Dubuque Stone Products Co. v. Fred L. Gray Co.,* 356 F.2d 718, 723 (8th Cir. 1966); *Celanese Corp. of America v. John Clark Industries,* 214 F.2d 551, 556 (5th Cir. 1954). There is here no likelihood that any member of the Association will sue subsequently, since the equitable relief granted redounds to the benefit of all members, whether or not they assigned claims to the Association.

Whether an unincorporated association may seek equitable relief for its members under Sections 4 and 5 of the Clayton Act [15 U.S.C. §§ 15 and 16], is clearly a matter of federal law. Fed.R.Civ.P. 17(b). *Cf. Klebanow v. New York Produce Exchange,* 344 F.2d 294, 296 (2d Cir. 1965). The Supreme Court has stated: "It is clear that an organization whose mem-

bers are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972). *See also NAACP v. Button,* 371 U.S. 415, 428, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *National Automatic Laundry & Cleaning Council v. Shultz,* 143 U.S.App.D.C. 274, 443 F.2d 689, 693-94 (1971), and cases cited therein.

Our recent decision in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 518 F.2d 913 (9th Cir. 1975), underscores this court's recognition that a private antitrust decree may and should be broad enough to restore competition in the relevant market. In that case we held:

> Injunctive remedies under § 16 may be as broad as necessary to ensure that "threatened loss or damage" does not materialize or that prior violations do not recur. . . . [W]e are confident that the pernicious manifestations or tendencies of an illegal vertical combination . . . are susceptible to direct injunctive restraint.

518 F.2d at 925. (Footnote omitted.)

These considerations compel us to conclude that, at least where, as here, the assignors are members of the trade association bringing suit, the assignee association may seek whatever equitable relief may be available to each assignor. This holding should both minimize the possibility of multiple lawsuits, and promote the broad remedial purposes of the antitrust laws.

2. *Propriety of the Relief Granted.*

The district court ordered that:

> 2. Sunkist be enjoined from refusing to make available to qualified purchasers oranges from the domestic department, regardless of the ultimate purpose for which that purchaser seeks the oranges; and
>
> 3. Sunkist be enjoined from refusing to sell oranges from its export department to any qualified exporters. The price to such exporters shall not exceed the net price at which Sunkist markets its oranges directly in Hong Kong. The net price shall be determined by deducting from quoted price in Hong Kong the cost of insurance, ocean freight, tolls, handling, commission to agents, and all other payments to third parties arising from the export of said oranges to Hong Kong.

Sunkist objects to the first paragraph on the ground that the relief granted will undermine the ability to market on a cooperative basis. However, the possibility that some packing houses may have to violate Sunkist's by-laws should not frustrate the district court's attempt to restore competition. *Compare Otter Tail Power Co. v. United States,* 410 U.S. 366, 378-79, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (otherwise valid contracts properly enjoined where they were part of a scheme to promote attempted monopolization and restraint of trade).

If Sunkist should ever find itself faced with the choice of complying with either the court's decree or a federal marketing order, it may petition the district court for guidance or modification. A similar petition

might be in order if shortages should arise and Sunkist should need to apportion its available oranges among its regular customers.[18]

Sunkist also objects to the requirement that it sell export department oranges to "any qualified exporters." While it may be that plaintiffs are not in a position to buy such oranges at the going rates, once Sunkist's rates are lowered to the "net price" as ordered, the demand will undoubtedly rise. This order is well within the court's broad remedial discretion.

B. *Plaintiffs' Request for Dissolution or Broader Injunction.*

In considering plaintiffs' request for Sunkist's dissolution or an order enjoining it from selling oranges and Reliance from selling Sunkist oranges in Hong Kong for six years, the district court held that:

> even assuming arguendo that [the court] has the power to award such relief to a private antitrust litigant, there has been no showing in this case which would justify, much less require, the extreme relief requested.

This court has subsequently ruled that the dissolution remedy is not available to private antitrust litigants. *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d at 922. We indicated that extensive direct injunctive restraints would be appropriate where essential to prevent the "pernicious manifestations or tendencies" of unlawful anticompetitive activities. *Id.* at 925. In this

[18]The district court properly retained jurisdiction of the case to effectuate its decree as necessary.

case, however, the district court clearly found the requested relief unnecessary to restore plaintiffs' ability to compete in the Hong Kong market.

On the facts before it, the court might well have determined that an injunctive order of the sort sought by plaintiffs would be unworkable and superfluous, and that it might hinder rather than promote competition in the Hong Kong export market. *Cf. Ford Motor Co. v. United States,* 405 U.S. 562, 568, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972). The district court granted substantial injunctive relief aimed at restraining appellees' anticompetitive activities, and we cannot say that the relief was inadequate.

VII.
MISCELLANEOUS ASSERTIONS

A. *Alleged Misconduct by Plaintiffs' Counsel.*

Appellees contend that the district court should have granted judgment n.o.v. or in the alternative a new trial because of misstatements by plaintiffs' trial counsel at closing argument concerning Sunkist's "admission" of a conspiracy, the failure of Sunkist's accountants to testify, the treatment of employee salaries in determining lost profits, and other matters. In reviewing the record we are impressed not only with the frivolity of these claims, but also with the great care exercised by the district court in conducting the trial and cautioning the jury. There was no error.

B. *Attorneys' Fees.*

Appellees contend the attorneys' fee award (83% of single damages) is excessive as a matter of law. This

court has recognized that determination of reasonable attorneys' fees requires consideration of a variety of factors. *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 221 (9th Cir. 1964). After considering all of the approriate factors, the court concluded that because of the magnitude, complexity and length of the litigation and the risk involved, a fixed percentage rule would be particularly inappropriate in this case and the 83% figure was to be "attributed no special significance."[19] The court's action is clearly within the contemplation of the rule laid down in *Twentieth Century Fox.*

VIII.

CONCLUSION

The judgment of the district court is in all respects affirmed.

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[19]The district judge devoted five pages of his memorandum opinion to a discussion of the factors to be considered by a court in awarding counsel fees, in light of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 245 F.Supp. 258, 302-303 (M.D.Pa.1965). He commented in detail on each of the eight factors. He noted "the presence of very eminent counsel on both sides of this case with very substantial experience in antitrust litigation." He drew upon his own knowledge of the time spent by counsel on "conferences, arguments, and time spent on the case both prior to as well as during the trial."

The court also demonstrated considerable knowledge of the contributions made by legal assistants to the attorneys, noting

> "As a matter of practice, most attorneys engaged in the antitrust practice use such legal assistants, particularly in digesting and indexing discovery and trial materials, much of the work heretofore performed by relatively inexperienced lawyers . . . . As a matter of policy, the use of paralegal help in this fashion greatly reduces the cost of legal services to the public and is thus a practice to be encouraged."

The court then approved the award of fees for such paralegal help after adjusting it slightly downward.

We would be sorely pressed to find a case in which the trial judge paid greater attention to the law and circumstances in deliberating over the award of attorneys' fees.

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

Pacific Coast Agricultural Export Association, Plaintiff-Appellant, Cross-Appellee, vs. Sunkist Growers, Inc., Defendant-Appellee, Cross-Appellant.	Nos. 74-1093 74-1128
M-C International, Inc., Plaintiff-Appellant, vs. Sunkist Growers, Inc., et al., Defendant-Appellee, Cross-Appellant.	Nos. 74-1094 74-1129 74-1130

[Filed Dec. 17, 1975]

ORDER DENYING REHEARING

Before: DUNIWAY, ELY and WRIGHT, Circuit Judges.

The petition for rehearing is denied. The opinion is corrected in the following particulars:

A footnote 9 is added on page 6, line 22 (slip opinion at p. 5) following the words "SECTION 1 CLAIM," to read:

> 9. Damage issues under all claims are discussed in Section V, *infra.*

At page 7, line 29 (slip opinion at p. 6), following the words "acquired by plaintiffs.", there will be added a sentence,

> Early in 1966 Sunkist not only stopped issuing quotations, but also terminated export sales, to domestic exporters.[10]

Footnote 10 will read:

> These facts also support the conclusion that unreasonable restraint of trade was effectuated. However, we need not reach this issue since unlawful purpose alone is enough to support a finding of an "actionable conspiracy." *Bushie, supra,* 460 F.2d at 120.

There will be deleted from the opinion at page 8, line 10 (slip at 6-7) the entire paragraph which ends at line 16, together with the footnotes pertaining to that paragraph.

Appendix C

In the United States Court of Appeals
for the Ninth Circuit

Pacific Coast Agricultural Export Association, Plaintiff-Appellant, Cross-Appellee, vs. Sunkist Growers, Inc., Defendant-Appellee, Cross-Appellant.	Nos. 74-1093 74-1128
M-C International, Inc., Plaintiff-Appellant, vs. Sunkist Growers, Inc., et al., Defendants-Appellees, Cross-Appellants.	Nos. 74-1094 74-1129 74-1130

[Filed Jan. 29, 1976]

ORDER DENYING PETITION
FOR REHEARING

Before: DUNIWAY, ELY and WRIGHT, Circuit Judges.

The Petition for Rehearing on Corrected Opinion filed December 31, 1975 has been considered and is denied.

Appendix D

United States District Court
Northern District of California

Pacific Coast Agricultural Export Association, Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants.	No. C-49691-CBR
M-C International, Inc., Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants.	No. C-69-331-CBR
Robert Louis Lepinay, Plaintiff, vs. Sunkist Growers, Inc., et al., Defendants.	No. C-69-332-CBR

[Filed May 11, 1973]

MEMORANDUM OF OPINION AND ORDER

These actions were commenced on July 29, 1968, when plaintiff Pacific Coast Agricultural Export Association ("Export Association"), an unincorporated association organized under the Webb-Pomerene Act, 15 U.S.C. §§61-65, whose members assigned their

claims to the Export Association for purposes of the suit, brought suit against Sunkist Growers, Inc. ("Sunkist"), alleging violations of the antitrust laws. Thereafter, plaintiffs Robert Lepinay and M-C International, Inc., filed complaints against Sunkist and Reliance Commercial Enterprises, Inc. ("Reliance"), on March 19 and August 14, 1969, respectively. On December 8, 1969, all three cases were consolidated for discovery, pre-trial, and trial proceedings by agreements of the parties. Specifically, it was alleged that in March 1966, Sunkist determined to sell its citrus fruit in Hong Kong directly through an exclusive agent there, Reliance, and thereafter refused to sell to plaintiff exporters any citrus fruit for export to Hong Kong through either the export pool or the domestic market. In consequence, it was alleged that Sunkist, alone and in combination with Reliance, attempted, conspired, and did monopolize the interstate and foreign trade in the sale and shipment of citrus fruit from California to Hong Kong in violation of the Sherman Act. Plaintiffs therefore sought treble damages and attorneys' fees under §4 of the Clayton Act, 15 U.S.C. §15, and appropriate equitable relief, under 15 U.S.C. §26.

On August 17, 1971, the Court ordered that the issues of liability and damages be bifurcated for trial before the same jury. The liability phase of the trial was then tried to the jury beginning on September 11, 1972. It was both extensive, involving some 1000 exhibits, 8,194 pages of transcript, and 31 trial days, as well as extremely complex.

Raised therein were questions concerning the status and functions of export associations, such as plaintiffs', formed under the aegis of the Webb-Pomerene Act, 15 U.S.C. §§61-65, the scope of the exemption from the antitrust laws granted to agricultural cooperatives such as defendant Sunkist under the Capper-Volstead Act, 7 U.S.C. §291, and the retroactivity of the Supreme Court's decision in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967). An indication of the complexity of the case is shown by the fact that the Court spent five days in chambers with counsel working on jury instructions.

On November 3, 1972, the jury returned a verdict for plaintiffs Export Association and M-C International, Inc., but found against plaintiff Lepinay as to both defendants. The jury found that (1) Sunkist and Reliance had conspired in restraint of trade by refusing to sell oranges to the exporters for export, (2) that Sunkist and Reliance had conspired to monopolize the relevant market consisting of oranges grown in Arizona and California for export to Hong Kong, (3) that Sunkist had attempted to monopolize that market, and (4) that Sunkist had monopoly power and did in fact monopolize that market. Following the trial on damages, the jury, on November 17, 1972, returned an award for Export Association in the amount of $238,704 and for M-C International, Inc., in the amount of $2,363.

On January 26, 1973, plaintiffs moved for an award of attorneys' fees, pursuant to §4 of the Clayton Act, and for certain equitable relief, pursuant to §16 of the

Clayton Act, 15 U.S.C. §§ 15 and 26. Specifically, plaintiffs requested attorneys' fees in the amount of $246,712.00 in the Export Association case and $31,411.05 in the M-C International, Inc. case for a total of $278,123.10, while other counsel sought $10,000 for work done early in the case. On May 1, 1973, plaintiffs' attorneys asked for an additional $9,474 in attorneys' fees, $8,290 in the Export Association case and $1,184 in the M-C International, Inc., case, for legal services performed in connection with the application for equitable relief. Defendants contended that plaintiffs' attorneys' fees should run between 15 and 35 per cent of the single damages awarded, or between $36,150 and $84,350. In addition, plaintiffs sought the dissolution of Sunkist Growers, Inc., claiming that to be the only possible manner of curing the effects of the illegal practices found by the jury. It is to the merits of these two requests that the Court now directs its attention.

Attorneys' Fees

In awarding attorneys' fees, the court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F.Supp. 258 (M.D.Pa. 1965) listed as some of the factors to be considered the following:

> "(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recov-

> ered, (7) the knowledge the court has of the conferences, arguments that were presented, and of work shown by the record to have been done by attorneys for the plaintiff prior to the trial, (8) what it would be reasonable for counsel to charge a victorious plaintiff." 245 F.Supp. 302-303.

While these factors can assist the court in assessing the attorneys' fees to be awarded, no particular formula can be relied on since it is the particular combination of these factors in a case which makes each award *sui generis*. In sum, each case turns on its own facts.

The facts of this case reveal first the absence of any prior judgment or decree in a case brought by the Government.* Second, the court notes the presence of very eminent counsel on both sides of this case with very substantial experience in antitrust litigation. Third, the Court must consider the time and labor spent by counsel on the case, as evidenced both by the affidavits and records submitted by counsel, and by the knowledge which the Court has of the conferences, arguments, and time spent on the case both prior to as well as during the trial. Without going into the details of the time sheets and statistics, it is clear that plaintiffs' attorneys did spend 3,700 hours on the case. While there was some questions as to the allocation

*A Government consent decree entered in *United States v. California Fruit Growers Exchange, et al.*, 1940-43 CCH Trade Cases, paragraph 56,247 (S.D.Cal. 1942), involving Sunkist's predecessor, was discovered and supplied the Court after the trial was over. This decree was not a part of the record, not relied upon to establish liability, and given no weight in this Court's decision as to fees. Indeed, it is not clear that the decree reaches any of the conduct in question here.

of hours made by plaintiffs, the Court notes that much of the time allocated to plaintiff Lepinay, who was found not to have been damaged by defendants, was in fact used to take evidence which was vital to the liability phase of the trial. Accordingly, such time should properly have been included in plaintiffs' billable hours, and more than compensates for any of the minor misallocations alleged. As set out in Mr. Archer's affidavit, the Court finds the hours to have been fairly allocated to the cases. Insofar as the Court has in effect reduced the number of billable hours claimed, it may be said to result from the normal practice of so doing where there is a change in counsel responsible for a case which occurred here. This is done because of the overlapping effort involved in each lead attorney's familiarizing himself with the case.

Fourth, the Court has already noted the magnitude and complexity of the litigation and the substantial efforts of counsel for both sides in disposing of those issues.

Fifth, the Court gives some consideration to the actual amounts recovered. Accordingly, counsel have presented several cases urging that the Court use the percentages of damages awarded in those cases as attorneys' fees as guides in reaching an award in this case. The Court, however, is of the opinion that these cases are of little value. An analysis of the cases, as well as those found in "Attorneys' Fees in Individual and Class Action Antitrust Litigation," 60 Cal.L.Rev. 1656 (1972) reveals that many of those cases are over twenty years old. The substantial increase in hourly

charges for legal services over that time period make the earlier decisions of dubious value. More importantly, the Court feels that each case must turn on its own facts and that any attempt to rely on such a statistical analysis or percentage formula creates but an illusion of precision and fairness.

Finally, the Court gives some weight to its view of what would have been reasonable for counsel to charge a victorious plaintiff. Noteworthy in this respect were Sunkist's own attorneys' fees, which counsel represented to be $234,488.85. In addition, the Court felt that some inquiry into plaintiffs' fee arrangement with counsel was advisable in view of the decision by the Court of Appeals for the First Circuit in *Farmington Dowel Products Co. v. Forster Mfg. Co.,* 436 F.2d 699 (1 Cir. 1970). Under the arrangements made, counsel is to receive 20 per cent of the damages awarded to Export Association and 33 per cent of those awarded to M-C International, Inc., both in addition to the attorneys' fees awarded.

These six factors constituted the principal considerations in the Court's assessment of attorneys' fees in this case. Accordingly, the Court feels that an award of $192,700 in the Export Association case and $2,300 in the M-C International case is a reasonable attorneys' fee, while Mr. Simpson is due an additional $5,000 for his preliminary work in the cases, thereby making the total award $200,000.* The Court is well

*The Court finds that plaintiffs' counsel did in fact expend some 3700 hours of attorneys' time in the handling of the Export Association case. In awarding attorneys' fees in that case in the amount of $170,200, the other $22,500 being attributable to the work of

aware of the fact that that is approximately 83 per cent of the single damages awarded, but feels that, for the reasons explained, this figure is to be attributed no special significance.

In view of the limited nature of the equitable relief granted, the Court has awarded not attorneys' fees for the legal services rendered in connection with that application.

Of the attorneys' fees awarded, approximately $22,500 thereof represents the time charges attributable to the firm's legal assistants. While it is well established that the costs awarded a successful antitrust private plaintiff may not include fees assessed for the work done by accountants, *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190 (9th Cir. 1964), the Court feels that the work done by legal assistants is substantially different and should properly be considered a part of the award of attorneys' fees. In so holding, this Court is fully aware of the view expressed by Judge Metzner in *Trans World Airlines, Inc. v. Hughes,* 312 F.Supp. 478 (S.D.N.Y. 1970), where the court refused to award fees for persons who worked on the case but were not members of the Bar in the year that the services were rendered. However, that decision does not preclude an award for the serv-

legal assistants, the Court thereby allows an average hourly rate of $46 for the attorneys' time spent. While somewhat in excess of that allowed in the recent Ninth Circuit opinion in *Perkins v. Standard Oil Company of California,* 474 F.2d 549 (9th Cir. Feb. 12, 1973), the Court feels that this difference is justified in view of the greater portion of partners' time involved in this case. Specifically, the Court feels the $75 hourly rate requested by Mr. Archer and Mr. Sullivan to be reasonable, other partners being billed at $60 an hour, and the associates at between $35 and $50 an hour.

ices of legal assistants, and this Court does so for reasons of both policy and practice. As a matter of practice, most attorneys engaged in the antitrust practice use such legal assistants, particularly in digesting and indexing discovery and trial materials, much of the work heretofore performed by relatively inexperienced lawyers. Clients are generally notified of this practice, and the statement for legal services include a charge for the work of these assistants. As a matter of policy, the use of paralegal help in this fashion greatly reduces the cost of legal services to the public and is thus a practice to be encouraged. A contrary result might be seized by some as requiring attorneys to perform the services of collating documents and digesting and indexing testimony, for example. Such a result would be neither efficient nor in the public interest. Accordingly, this Court holds that the costs of legal assistants are properly to be included in determining reasonable attorneys' fees.*

Equitable Relief

In its prayer for equitable relief, plaintiffs pray that the Court order the dissolution of Sunkist Growers, Inc., or, alternatively, that it order Sunkist to refrain from sales of oranges in Hong Kong. Plaintiffs also ask that Reliance be enjoined for selling oranges in Hong Kong for a period of time equal to that during which they engaged the fruits of their illegal exclusive agreement, approximately six years. For the reasons set out below, the Court holds that, even assuming arguendo that it has the power to award such relief to a private antitrust litigant, there has been no showing in this case which would justify, much less require, the extreme relief requested.

*In this particular case, however, the Court feels that an award of $20 per hour for the 1500 assistant hours involved in this case is too high. Where the assistants are expected to contribute 35 billable hours per week, or approximately 1750 hours per year, and are earning between $750 and $1,000 per month, or $9,000-$12,000 per year, a twenty dollar an hour rate would probably return a profit to the firm, even after allocating appropriate overhead and related expenses to the legal assistants. The Court feels that the firm may not include an element of profit in its statement for such services, and therefore feels that $20 per hour is excessive. Accordingly, the appropriate rate in this instance is $15 per hour.

As authority for the proposition that courts are empowered to award private litigants a decree dissolving the antitrust violator, plaintiffs refer the Court to two recent cases in this Circuit, *International Telephone and Telegraph Corporation v. General Telephone & Electronics Corp.*, 351 F.Supp. 1153 (D.Haw. 1972) and *Calnetics Corporation v. Volkswagen of America, Inc.*, 348 F.Supp. 606 (C.D.Cal. 1972). A reading of both of these cases reveals that it was not dissolution, but rather divestiture, which the courts ordered in those cases. Courts have in fact recognized the very substantial distinction between these remedies, the one involving the mere disengagement of the offending units, usually under the aegis of §7 of the Clayton Act, 15 U.S.C. §18, and the other the abolition of the entity altogether. In speaking even of divestiture, the courts have stressed the restraint with which the remedy must be used. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951).

Furthermore, this Court is aware of no case in which a private litigant, as opposed to the Govern-

ment, has been awarded such relief. We need not reach that question here in any event, since there has been no showing which would justify such relief in this case.

The gravamen of plaintiffs' complaint in this action was that defendants had refused to sell them oranges, thereby cutting off their only source of supply, by the exclusive agreement with Reliance, and it is that condition which the Court has sought to cure in fashioning its equitable decree.

Accordingly, It Is Hereby Ordered and Adjudged that:

1. The exclusive selling agreement entered into by Sunkist and Reliance be terminated and not be given any further effect by the parties;

2. Sunkist be enjoined from refusing to make available to qualified purchasers oranges from the domestic department, regardless of the ultimate purpose for which that purchaser seeks the oranges; and

3. Sunkist be enjoined from refusing to sell oranges from its export department to any qualified exporters. The price to such exporters shall not exceed the net price at which Sunkist markets its oranges directly in Hong Kong. The net price shall be determined by deducting from quoted price in Hong Kong the cost of insurance, ocean freight, tolls, handling, commission to agents, and all other payments to third parties arising from the export of said oranges to Hong Kong.

However, nothing in this decree shall be construed as enjoining or restraining Sunkist from selling oranges directly to Hong Kong, either on its own or through non-exclusive sales agents.

It Is Hereby Further Ordered and Adjudged that jurisdiction of this case is retained for the purpose of enabling any of the parties to apply to this Court at any time for such further relief as may be appropriate for the effectuation of this decree.

Dated: May 11, 1973.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

Appendix E

In the District Court of the United States
for the Southern District of California,
Central Division

Civil Action No. 2577-BH

[¶56,247] United States v. California Fruit Growers Exchange; California Fruit Exchange; Florida Citrus Exchange; Di Giorgio Fruit Corporation; American Fruit & Produce Auction Association, Inc.; American Central Fruit Auction Company; Baltimore Fruit Exchange; Consolidated Fruit Exchange, Incorporated; Detroit Fruit Auction Company; Fruit Auction Sales Company; New York Fruit Auction Corporation; H. Harris & Company; Philadelphia Terminals Auction Company; Union Fruit Auction Company; The United Fruit Auction Company.

[Filed November 18, 1942]

Decree entered before PEIRSON M. HALL, U.S. District Judge.

"[Appearances of Counsel Omitted]"

CONSENT DECREE

The United States of America having filed its complaint herein on the 16th day of November, 1942, against the defendants named hereinabove; all of the defendants having appeared severally and filed their

answer to such complaint denying the substantive allegations thereof, and all parties hereto by their respective attorneys herein having severally consented to the entry of this Final Decree herein without trial and without admission by any party in respect of any issue:

Now, therefore, before any testimony has been taken herein, and upon the consent of all parties hereto, it is hereby

Ordered and decreed as follows:

I

[*Jurisdiction and Cause of Action*]

The Court has jurisdiction of the subject matter hereof and of all the parties hereto; the complaint states a cause of action against the defendants and each of them under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II

[*Definitions*]

The ensuing terms and phrases, as used in this Decree, will have meaning as follows:

1. "Fruits" mean fresh citrus and fresh deciduous fruits of all kinds marketed in interstate commerce.

2. "Shippers" mean persons, firms, associations, and corporations which ship, distribute, and sell fruits.

3. "Defendant shippers" are: California Fruit Growers Exchange, California Fruit Exchange, Florida Citrus Exchange, DiGiorgio Fruit Corporation (but only as a shipper).

4. "Auction companies" mean persons, firms, associations, and corporations by and through which fruits are sold at auction.

5. "Defendant auction companies" are: American Central Fruit Auction Company, Baltimore Fruit Exchange (an operating unit of DiGiorgio Fruit Corporation, but only as such operating unit), Consolidated Fruit Exchange, Incorporated, Detroit Fruit Auction Company, Fruit Auction Sales Company, H. Harris & Company, New York Fruit Auction Corporation, Philadelphia Terminals Auction Company, Union Fruit Auction Company, The United Fruit Auction Company.

6. "Auction markets" mean places at and through which fruits are sold at auction.

7. "Auction centers" mean cities in which auction markets operate, and include the following: Baltimore, Maryland; Boston, Massachusetts; Chicago, Illinois; Cleveland, Ohio; Cincinnati, Ohio; Detroit, Michigan; New York, New York; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; and St. Louis, Missouri.

8. "Private sale markets" mean wholesale trading places at and through which fruits are sold otherwise than at auction.

9. "Subsidiary" means either (a) a corporation 50 percent or more of whose issued and outstanding stock

of voting class, or of all classes, is owned, directly or indirectly, by another corporation, or (b) a corporation whose policies or activities are dominated or controlled by another corporation.

III

[*Conspiracies Enjoined*]

Each defendant, its directors, officers, agents, employees, successors, and subsidiaries, and all persons acting for or on behalf of any defendant, its successors, or subsidiaries, be and they are hereby enjoined and restrained from conspiring among themselves or with any other person:

1. To fix, maintain, or stabilize prices at which fruits are quoted or sold;

2. To distribute or sell fruits exclusively or preferentially in any specified manner or through any designated channel, whether it be through auction markets, private sale markets, f.o.b. production centers, or otherwise, or to increase, decrease, fix, control, or determine the kind or amount or quality of fruits to be quoted, supplied, distributed or sold during any period of time at any auction or private sale market or at any production center, or through any channel, or by any shipper, or to any broker, receiver, or buyer;

3. To refuse to distribute or sell fruits at production centers or at private sale in any auction center or in any city or district adjacent to or within predetermined distances of any auction center, or to refuse to distribute or sell fruits of any kind or grade at any place or markets in carlots or other quantities cus-

tomarily sold at such place or market, to any designated buyer or class of buyers, or to any person known or believed to engage in the practice of diverting or re-shipping fruits to other places or markets.

IV

[*Individual Activities Enjoined*]

Each defendant, its directors, officers, agents, employees, successors, and subsidiaries, and all persons acting for or on behalf of any defendant, its successors or subsidiaries, be and each of them is hereby enjoined and restrained from:

1. Threatening or coercing any competitor for the purpose of preventing, restricting, or eliminating competition, in the distribution or marketing of fruits at any auction or private sale market;

2. Obstructing, preventing, or interfering with the distribution of fruits by motor truck, or the marketing of fruits so distributed at auction, private sale, or in any other manner;

3. Obstructing, restricting, eliminating the use of, or interfering with any private sale market in any auction center or elsewhere, or any operator or patron thereof, for the purpose of destroying competition in the distribution or sale of fruits, through threatening, intimidating, or coercing any such operator or patron or any transportation company;

4. Obstructing, restricting, or interfering with the purchase by others of fruits, through any particular channel, or place, or obstructing, restricting, or interfering with the purchase of fruits directly from any other shipper by any agency of federal, state, or local Government or any other person;

5. Misrepresenting the ownership or operating methods of any defendant auction company or defendant shipper;

6. Requesting or causing any financial institution, transportation agency, or credit agency, or any other organization, or any representative thereof, to coerce in any manner any producer, shipper, distributor, or buyer to conform to any designated marketing practice or program or to refrain from dealing with any designated marketing agency;

7. Securing preferences or advantages, through threatening or coercing any transportation company or terminal market company, or any official or employee thereof, in the terminal handling, servicing, or sale of fruits; or demanding, receiving from, or granting to any shipper, auction company, operator of a private sale market, or transportation company any secret charge, secret rebate, secret concession, or any other secret preference or advantage;

8. Imposing any term or condition in connection with a sale of fruits to any buyer which restricts such buyer's use or disposition of any fruit acquired by him, or obligates such buyer then or thereafter to support or patronize any defendant exclusively or preferentially, or which, except for occasional shipments of mixed cars, makes the purchase at a terminal market of a designated kind of fruit a condition of availability of any other kind of fruit to such buyer.

V

[Activities of Auction Companies and Association Enjoined]

The defendant American Fruit & Produce Auction Association, Inc., and the defendant auction companies and their successors and subsidiaries and all persons acting for or on behalf of them, or any of them, be and each of them is hereby further enjoined and restrained from directly or indirectly:

1. Sponsoring, establishing, or participating in any pool for the purchasing or sale of fruits;

2. Purchasing fruits for resale at auction or private sale markets, except when fruits of the kind purchased and offered for resale are not available from shippers, and provided that announcement of the ownership thereof by the auction company be made at the time or offer for resale;

3. Making loans or advances or extending privileges to producers or shippers unless the same be available on equal terms to all persons selling through such defendant auction company;

4. Adopting, publishing, or utilizing auction rules or catalogs which list, arrange, classify, segregate, or fix the manner, time, or places of sale of fruits so as to unfairly favor certain, or any, shippers or buyers as against other shippers or buyers;

5. Making known or available any information concerning any shipper or shipment unless similar information concerning all other shippers or shipments

is likewise available upon equal terms to the trade generally;

6. Misrepresenting or concealing any material fact respecting the marketing policies, practices, or accomplishments of any auction or private sale market or any auction company;

7. Imposing or collecting charges or fees for its own account for facilities or services which are not being supplied or rendered.

VI

[Information to Be Posted by Auction Companies]

Each defendant auction company shall post and maintain in a conspicuous place in its main office and also in its principal fruit auction sales room:

1. A complete and current list of its stockholders, bondholders, and secured creditors who, to the knowledge of the auction company or its officers, are producers, shippers, receivers, brokers, or buyers of fruits;

2. A complete and current list of its officers, directors, partners, and employees who, to the knowledge of the auction company or its officers, are financially interested in the business of any shipper, receiver, broker, or buyer of fruits;

3. A complete and current schedule of all its charges, fees, and terms of sale for all classes of commodities, shippers, and buyers.

VII

[Department of Justice to Have Access to Records, Interviews and Reports]

For the purposes of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice, on written request of the Attorney General or an Assistant Attorney General and on reasonable notice to any one of the defendant corporations made to the principal office of such defendant corporations, shall be permitted, subject to any legally recognized privilege: (1) access, during the office hours of such defendant corporations, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant corporations, relating to any matters contained in this Decree; (2) subject to the reasonable convenience of such defendant corporations and without restraint or interference from them, to interview officers or employees of such defendant corporations, who may have counsel present, regarding any such matters; and (3) such defendant corporations, on such request, shall submit such reports in respect of any such matters as from time to time may be reasonably necessary for the proper enforcement of this Decree; *Provided, however,* that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this Decree in which the United States is a party or as otherwise required by law.

VIII

[Jurisdiction Retained]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Decree, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Supreme Court, U. S.
FILED
APR 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1311

SUNKIST GROWERS, INC.,

Petitioner,

vs.

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION and M-C INTERNATIONAL, INC.,

Respondents.

BRIEF IN OPPOSITION.

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April 14, 1976.

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Case-Swayne Co. Inc. v. Sunkist Growers, Inc., 389 U.S. 384 (1969)	6
Case-Swayne Co. Inc. v. Sunkist Growers, Inc., 355 F.Supp. 408 (C.D. Cal. 1971)	6
International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913 (9th Cir. 1975)	7
Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962)	6
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)	4, 6
United States v. American Tobacco Co., 221 U.S. 106 (1910)	4
United States v. E. I. Du Pont de Nemours & Co., 366 U.S. 316 (1961)	4, 5, 6

Statutes	
Clayton Act, Sec. 7	6
Clayton Act, Sec. 16	7
Sherman Act, Sec. 1	2
Sherman Act, Sec. 2	2, 6, 8
United States Code, Title 7, Secs. 291-292	5
United States Code, Title 15, Sec. 1	2
United States Code, Title 15, Sec. 2	2
United States Code, Title 15, Sec. 18	6
United States Code, Title 15, Sec. 26	7
United States Code, Title 15, Secs. 61-65	5

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SUNKIST GROWERS, INC.,

Petitioner,

vs.

PACIFIC COAST AGRICULTURAL EXPORT ASSOCIATION and M-C INTERNATIONAL, INC.,

Respondents.

BRIEF IN OPPOSITION.

The members of petitioner Pacific Coast Agricultural Export Association ("Association") and petitioner M-C International, Inc. ("M-C") are exporters of fresh fruits and vegetables to various foreign countries, including the Crown Colony of Hong Kong. Respondent Sunkist Growers, Inc. ("Sunkist") is a federated agricultural marketing cooperative, which provides its 8,500 citrus grower members in California and Arizona with sales facilities, engineering, research and entomological assistance, by-products processing and advertising, including the use of the Sunkist trademark. Sunkist sells oranges, lemons, grapefruit and their by-products throughout the United States, Canada, Europe and the Far East.[1]

[1]Sunkist has filed its own petition for certiorari (No. 75-1325) in which the facts of this case are set forth in greater detail.

Prior to 1966, Sunkist marketed its oranges in Hong Kong through petitioners and other exporters located on the West Coast of the United States. Then, in response to severe competitive pressure from other orange producing countries, such as Israel, South Africa and Australia, Sunkist entered into an exclusive sales agency agreement with Hong Kong-based Reliance Commercial Enterprises, Inc. ("Reliance"),[2] and as a consequence stopped selling export oranges directly to petitioners.

Petitioners brought suit charging violations of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The jury found Sunkist (and in M-C's case, Reliance) had violated §§ 1 and 2, and in response to a special interrogatory concluded Sunkist had monopolized a market defined as "oranges grown in California and Arizona for export to Hong Kong."

Petitioners then requested the district court to order the *dissolution* of Sunkist. The district court rejected that prayer, stating:

> "For the reasons set out below, the Court holds that, even assuming arguendo that it has the power to award such relief [dissolution] to a private antitrust litigant, there has been no showing in this case which would justify, much less require, the extreme relief requested.
>
> * * *
>
> "Furthermore, this Court is aware of no case in which a private litigant, as opposed to the Government, has been awarded such relief [dissolution]. We need not reach that question here in any event, since there has been no showing which would justify such relief in this case.
>
> "The gravamen of plaintiffs' complaint in this action was that defendants had refused to sell them oranges, thereby cutting off their only source of supply, by the exclusive agreement with Reliance, and it is that condition which the Court has sought to cure in fashioning its equitable decree." (Petition, A39-40.)

[2]Reliance was named as a defendant in the action brought by M-C, but it has indicated it has no interest in the outcome of the proceedings before the Court.

The district court ordered Sunkist to end its exclusive arrangement with Reliance and to sell petitioners and other exporters oranges from either its domestic or export department.

On November 11, 1975, the court of appeals affirmed the district court's injunctive decree in full. (Petition, 24-25.)

1. On this record, it would be improvident for the Court to review the question presented by petitioners. As noted above, the district court recognized the "gravamen of plaintiffs' complaint in this action was that defendants had refused to sell them oranges." The district court sat through a nine-week trial and a hearing on injunctive relief and reviewed over 2,000 exhibits. It determined on that record that Sunkist's violations (accepting the jury's verdict that they occurred) were properly remedied by requiring Sunkist to sell oranges to the Association's members and other exporters, and structured its injunctive decree accordingly. Petitioners have presented no argument that the district court's decision on the facts of this case was erroneous or influenced in any way by the court's view of the availability of the remedy of dissolution. Indeed, the court twice in its opinion expressly assumed

that even if dissolution were available, petitioners had made "no showing" they were entitled to such drastic relief. Therefore, however this Court might decide the question of the availability of dissolution, it would in no way affect the outcome of this case. Petitioners' problem is with the facts, not the law.

2. To grant such sweeping relief where lesser relief will do would be to ignore the Court's own guidelines that dissolution is not to be used unless no other, less harsh, form of relief will suffice. *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 603 (1951). It would also fail to give proper regard "for the vast interests of private property which may have become vested in many persons . . . without any guilty knowledge or intent in any way to become actors or participants in the wrongs . . . ." *United States v. E. I. Du Pont de Nemours & Co.,* 366 U.S. 316, 328 (1961), quoting *United States v. American Tobacco Co.,* 221 U.S. 106, 185 (1910).

It is clear that dissolution of Sunkist would be exceedingly harsh for Sunkist members. It would be disastrous, if not altogether destructive of their businesses—all to provide a remedy that petitioners could not possibly demonstrate is necessary. For example, dissolution would deprive the members of the use of the "Sunkist" trademark, which has been a highly prized symbol of premium quality citrus fruit in the United States and abroad. Sunkist sales offices in the United States and overseas would have to be broken up. The processing plants now used to make juice and citrus by-products would have to be disposed of.

3. The failure of petitioners to face these issues also argues strongly against giving such a powerful

weapon as dissolution to any private party, who may wield it to advance its own selfish interests rather than those of the public at large. Here the obvious purpose of petitioners is to eliminate Sunkist as petitioners' only significant competition in the sale of oranges to Hong Kong. The Association, because it is organized under the Webb-Pomerene Act (15 U.S.C. §§ 61-65), sets a uniform markup for its members, and those markups are regularly followed by nonmember exporters. Only Sunkist's agent Reliance sets a different —and lower—markup. It is not surprising, therefore, that petitioners wish Sunkist dissolved.

4. If dissolution were ever appropriate in any case, it would be directed toward a situation where "the heart of the conspiracy is the combination itself." *United States v. E. I. Du Pont de Nemours & Co., supra,* 366 U.S. at 329. This is simply not true here. In this case, dissolution of Sunkist would have as its primary effect the complete restructuring of the market made up of the producers of citrus fruits in California and Arizona, or the supply market. Petitioners do not compete with Sunkist in the supply market, but only in the distribution of oranges to Hong Kong, which is a different market. Therefore, the voluntary association of producers in an agricultural cooperative is irrelevant to the alleged conspiracy; dissolution of the cooperative would have only a collateral effect in the market allegedly monopolized and thus would be excessive and punitive.

Moreover, dissolution would deprive Sunkist's members of their rights under the Capper-Volstead Act (7 U.S.C. §§ 291-292) to join together to market their products exempt from the antitrust laws even

though the court of appeals below specifically recognized that the voluntary association of producers in the cooperative was protected under Capper-Volstead. (Petition, A-10.)[3]

5. Not only do the facts of this case fail to raise the question of the availability of dissolution to a private antitrust plaintiff, there is no conflict in the circuits on the question. In the cases cited by petitioners (Petition, 6-8), the question has been in terms of a *divestiture* of units found to be illegally acquired under § 7 of the Clayton Act (15 U.S.C. § 18). This case deals with total dissolution for an alleged violation of § 2 of the Sherman Act. There is a clear distinction between these remedies. Divestiture is to be "in the forefront of a court's mind" in a § 7 case, *United States v. E. I. Du Pont de Nemours & Co., supra,* 366 U.S. at 331, whereas dissolution is not to be used unless no other, less harsh form of relief will suffice. *Timken Roller Bearing Co. v. United States, supra,* 341 U.S. at 603. This obvious difference between the two remedies indicates that the Court will rarely face the issue of dissolution;

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[3]In *Case-Swayne Co. Inc. v. Sunkist Growers, Inc.,* 389 U.S. 384 (1969), the Court found Sunkist as then organized not in technical compliance with the Capper-Volstead Act, but it has since reorganized to remedy the situation. *Case-Swayne Co. Inc. v. Sunkist Growers, Inc.,* 355 F.Supp. 408 (C.D. Cal. 1971).

Petitioners' allegation that Sunkist is "an habitual violator of the antitrust laws" and a "recidivist" in antitrust terms (Petition, 5 and n. 1) may be high drama but is based on a mischaracterization of the cited cases, including *Case-Swayne*. Compare petitioners' characterization of *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 29-30 (1962) (Petition, 5, n. 1) and the Court's actual holding in that case. Moreover, these contentions were argued to the district court and rejected. In all events, the allegation is irrelevant to the Petition.

it should reject petitioners' efforts to obscure the distinction and create a false conflict. If there is a difference among the circuits on the issue of divestiture, a divestiture case rather than a dissolution case should be taken to resolve that conflict.

6. The Association does not have standing to seek any injunctive relief whatsoever, much less dissolution. It is a party to this case solely because it is the assignee of the claims of its members; the Association itself conducts no business and is therefore not a person threatened by a violation of the antitrust laws on whom § 16 of the Clayton Act (15 U.S.C. § 26) confers standing to seek injunctive relief. See Sunkist Petition for Certiorari (No. 75-1325), pp. 23-25.

7. Sunkist has not here attempted to address in any material way the issue of whether in the abstract the remedy of dissolution should be available to a private party. However, Sunkist believes a full briefing of the issue would demonstrate a private party is not, and should not be, allowed to seek dissolution in an antitrust case. *Cf. International T. & T. Corp. v. General T. & E. Corp.,* 518 F.2d 913 (9th Cir. 1975).

8. Finally, Sunkist wishes to point out that petitioners' statements in this instance should be considered when reviewing Sunkist's own petition for certiorari (No. 75-1325). Nowhere in the petition is there a definition of the market which Sunkist has allegedly monopolized. As noted above, dissolution might be considered appropriate if, and only if, the monopolization were in the supply market, where the combination

of Sunkist's growers into a cooperative has its obvious, primary impact. The Ninth Circuit considered any such claim of monopolization of the supply market on the facts of this case as "absurd." (Petition, A-10.)

Sunkist agrees it is "absurd," but the record shows that petitioners relied on Sunkist's 70-75% share of the California-Arizona supply of oranges to lead the jury into believing that that market share was the relevant one to be used in determining liability under § 2 of the Sherman Act. A careful reading of the market definition on which petitioners relied, "oranges grown in California and Arizona for export to Hong Kong," shows it refers the jury to the supply market. This reference was not an inadvertent error. Only if petitioners had a verdict in hand which referred to the supply market could they go to the court with their request for dissolution; a verdict limited to the distribution market would hardly be a compelling reason for such drastic relief. Moreover, if petitioners had to rely on Sunkist's 45-62% share of the distribution market, they knew they would have had a more difficult, and Sunkist submits legally impossible, task of proving monopolization. The Ninth Circuit should have recognized the jury was misled, that it was focused on the wrong market when considering the § 2 claim, and that the § 2 verdict should have been reversed for legally insufficient evidence. Instead the Ninth Circuit affirmed the § 2 verdict, relying on Sunkist's status in the distribution market. Because these facts do not constitute legally sufficient grounds for a finding

of monopolization, Sunkist has sought review of that part, among others, of the opinion of the court of appeals.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari sought by the Association and M-C should be denied.

Respectfully submitted,

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